

**UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
REGION 29**

**MICHAEL STAPLETON ASSOCIATES LTD.
D/B/A MSA SECURITY**

Employer/Petitioner

and

Case 29-RM-266140

UNITED FEDERATION OF K-9 HANDLERS

Union

DECISION AND DIRECTION OF ELECTION

The Employer/Petitioner, Michael Stapleton Associates Ltd. d/b/a MSA Security (the Employer), provides security and explosive detection screening services with an office and place of business in New York, New York. On June 28, 2018, United Federation of K-9 Handlers (the Union) was certified as the exclusive collective-bargaining representative of a unit of full-time and regular part-time K-9 handlers employed by the Employer at locations throughout the United States. Unit employees, numbering approximately 460, are assigned to work at over 3000 client locations across the country every week. On September 14, 2020,¹ the Employer filed a petition with the National Labor Relations Board (the Board) under Section 9(c) of the National Labor Relations Act (the Act) asserting a reasonable, good faith uncertainty as to the Union's continuing majority status.

The sole issue for determination² in this case is whether the Region should conduct an election solely by mail or by mixed mail and manual ballot. On October 9, Hearing Officer Tracy Belfiore conducted the hearing in this matter by videoconference, during which the parties were invited to present their positions and supporting evidence regarding the issue of whether the election should be conducted by mail or by a mixed mail/manual ballot. Both parties filed post-hearing briefs, which have been duly considered.

The Board has delegated its authority in this proceeding to me under Section 3(b) of the Act. Based on the entire record in this proceeding, relevant Board law, I direct that the election be conducted by mail ballot due to the scattered nature of the employees in the unit.

¹ All dates herein are 2020 unless otherwise specified.

² Law Enforcement Officers Security Unions, Law Enforcement Officers Security & Police Benevolent Association (Intervenor) sought to intervene in these proceedings and, on October 7, filed a joint motion with the Union seeking to amend the name of the Union to reflect the its recent affiliation with the Intervenor. I granted the motion to intervene and allowed the Intervenor to participate in the hearing. However, based on evidence presented at the hearing, I directed the Hearing Officer to inform the parties that I was denying the motion to amend the Union's name. Based upon that denial, the Intervenor moved to withdraw from these proceedings, which motion I granted at the conclusion of the hearing.

Positions of the Parties

The Employer's Position

The Employer asserts that a mixed mail and manual ballot election is appropriate because it would likely result in greater participation by unit employees. The Employer proposes to have manual elections take place at five of its training centers across the country over a period of several weeks. It contends that employees who do not wish to vote in person would have the option to vote by mail. Employer's counsel also expressed concerns that "the mail has not been working."

The Employer's Proposed Election Arrangements

The Employer suggests that ballots be mailed out to all unit employees on a Monday. All employees could vote by mail, but certain employees would have an option to vote in person.

Under the Employer's proposal, two weeks after the ballots are mailed to unit employees, manual balloting will begin at the Employer's training centers as follows:

Monday, two weeks after ballots are mailed, in Norwalk, California from 8 a.m. to 4 p.m. for 40 employees.

Wednesday in Memphis, Tennessee from 6 a.m. to 12 noon for 50 employees.

Friday in Louisville, Kentucky from 8 a.m. to 2 p.m. for 22 employees.

Monday, three weeks after ballots are mailed, in Bensenville, Illinois from 8 a.m. to 2 p.m. for 23 employees.

Finally, in Orangeburg, New York, Wednesday, Friday and the following Monday, four weeks after ballots are mailed, from 8 a.m. to 4 p.m. for 55 employees each day for a total of 165 employees.

Under the Employer's proposal, approximately 300 of the 460 unit employees would be "invited" to attend training at these centers to coincide with the dates of the manual polling sessions. Once at the site for training, employees who attend will be "invited" to vote in small groups at intervals during the scheduled polling times. It is unclear whether unit employees regularly visit these training centers. In its post-hearing brief, the Employer asserts that training is required by the Support Anti-terrorism by Fostering Effective Technologies Act of 2002 (referred to as "The SAFETY Act" but no citation was given) and that training "generally takes place every thirty (30) days." However, the record is silent as to how frequently each employee is required to undergo such training. The Employer asserts that it could schedule the training sessions to coincide with the dates of the election.

The Employer asserts that the manual part of the election could be conducted safely. The Employer states that temperature checks would be taken for employees and that employees would be asked to complete a COVID certification similar to that described in GC Memorandum 20-10. Any employee whose temperature exceeds 100.4 or whose answers to the COVID certification indicate potential exposure would be turned away from the polls and “told to mail ballots.” The Employer maintains that employees are trained in protocols, precautions and preventative measures regarding COVID-19 and, as a result, the infection rate among the approximately 460 unit employees has been less than one percent over the past six months. The Employer agrees to comply with all state and local regulations as well as the protocols set forth in GC Memorandum 20-10 and to provide all the certifications suggested therein. The Employer provided copies of its own COVID policies, forms, and notices, as well as the New York State Department of Health’s “NY Forward Safety Plan Template,” but did not provide any relevant safety information for other locations at which manual polling is proposed.

In its position statement, the Employer suggests that all voters will initially receive a mail ballot and so voters who are turned away at the polls due to potential COVID exposure would be directed to mail their ballot instead. In its post-hearing brief, however, the Employer states that the Employer agrees, by unspecified means, to provide voters who are turned away with the contact information for a Board agent so that they may request a mail ballot and that it will consent to an unspecified extension of time to allow those voters to cast their ballots by mail.

The Union’s Position

The Union asserts that bargaining unit employees are located throughout the country and contends that it would be impossible for the Board to manage all the proposed locations effectively. It maintains that, given the significant health risk to voters, observers, Board agents, party representatives and the general public, the safest course of action would be to conduct the election solely by mail ballot. The Union notes that it would not have representatives available to go to each of the locations proposed by the Employer for manual balloting, so a mixed mail and manual election would greatly prejudice the Union. With regard to the Employer’s arguments regarding participation, the Union asserts that low voter turnout can happen in manual as well as mail ballot elections, especially where, the polling would not take place at a site where employees regularly report to work, as suggested by the Employer.

Analysis

A. A Mail Ballot Election is Appropriate Because Unit Employees Are Scattered

The facts of this case necessitate a mail ballot election. The Board has stated that at least three situations “normally suggest the propriety of using mail ballots: (1) where eligible voters are ‘scattered’ over a wide geographic area due to their job duties; (2) where they are ‘scattered’ in that their work schedules vary significantly, so that they are not present at a common location at

common times; and (3) where there is a strike, lockout or picketing in progress.” *San Diego Gas & Electric*, 325 NLRB at 1145. In addition, the Regional Director may direct a mail ballot election under “extraordinary circumstances.” *Id.* The Board also stated that the Regional Director should be mindful of the “efficient use of Board resources, because efficient and economic use of Board agents is reasonably a concern.” *Id.* The Board has held that Regional Directors have broad discretion to determine whether an election will proceed by manual election or by mail ballot. *Nouveau Elevator Industries*, 326 NLRB 470, 471 (1998). Many of the criteria for mail ballot elections are present in this case.

The fact that employees are scattered at over 3000 locations throughout the United States puts this case squarely within the first criterion for mail ballot elections established in *San Diego Gas*. The Employer proposes conducting the manual part of the election in five locations across the continental United States, spanning the entire country. The Union maintains that it would not be able to send a party representative to all of the locations proposed, thereby precluding its participation in the pre-election conferences and inspections of the polling places. Moreover, an election run in five different states, requiring agents from different Regional Offices, would not be an efficient use of agency resources, which is consideration under *San Diego Gas*.

Further, the Employer’s proposal would require extensive polling times for the number of employees at each location, thus meeting the second criterion for mail ballots established in *San Diego Gas*. For example, in Bensonville, Illinois, the Employer proposes six hours of polling time to allow 23 employees to vote. In Orangeburg, New York, the Employer proposes that the polls remain open for eight hours each day on three days for a total of 24 hours to accommodate a maximum of 165 voters. The need for extensive polling time meets the Board’s second criterion for mail ballots under *San Diego Gas*. See *GPS Terminal Services*, 326 NLRB 839 (1998) (where the Board found that a Regional Director did not abuse her discretion in directing a mail ballot election where unit employees did not work on a uniform schedule); see also *United Maintenance Co.*, 2013 WL 4855389 at *1 (N.L.R.B. 2013) (finding that a Regional Director did not abuse his discretion in directing a mail ballot election where unit employees were “‘scattered’ over space and time.”)

In addition, the Board considers the resources necessary to run an election where employees are scattered. The Employer’s proposal would require regional office resources from five different regions over approximately fifty hours of polling. See *GPS Terminal Services*, 326 NLRB at 839 (where the Board found that the Regional Director properly considered whether a manual ballot would be an efficient use of Board resources).

Due to the extent to which employees are scattered geographically and by shift and the resources required to run a manual election in this case, I will direct an election by mail ballot.

B. The Employer's Proposal Does Not Comply with Board Procedure

The Employer's proposal for a mixed mail and manual election does not comply with the Board's criteria for a mixed election. The *Casehandling Manual* states that "A mixed manual-mail election should be limited to situations where the group of employees which will vote manually and the group which will vote by mail are clearly distinguishable by classifications or work locations and can be easily identified by the parties." *Casehandling Manual* Sec. 11335.2. That is not the case here. Nothing the Employer has recommended in its position statement, position at the hearing, or in its brief conforms with Board procedures for conducting mixed mail and manual ballot elections. In support of its contention that a partial manual ballot is appropriate, the Employer cited concerns over the potential for lost or delayed ballots if the election is conducted entirely by mail, but offers no evidence to support its contention.

The Employer's proposal would require the Board to mail ballots to all unit employees and then selectively offer certain of those employees the option of voting in person. The Employer also suggests that the Board could mail absentee ballots to unit employees who are scheduled to vote manually but cannot or will not. For example, if an employee were scheduled to vote in person but either could not or would not, the Board would then send that employee a ballot. Either scenario introduces the potential for fraud and unreasonable delay. For example, an employee who received a ballot by mail could claim to need another at the polling site and then secretly cast two ballots.

Further, the Board does not permit absentee ballots. *Cedar Tree Press, Inc.*, 324 NLRB 26 (1997), enf. 169 F.3d 794 (3d Cir. 1999); *KRCA-TV*, 271 NLRB 1288 (1984). In its early days, the Board allowed absentee ballot by military personnel, but it discontinued the practice in 1941. *Wilson & Co.*, 37 NLRB 944 (1941). The policy was reiterated in *Atlantic Refinery Co.*, 106 NLRB 1268 (1953). Specifically, ballots for voting by mail should not be provided to, inter alia, those who are in the Armed Forces, ill at home or in a hospital, on vacation, or on leave of absence due to their own decision or condition. *Casehandling Manual*, Secs. 11302.4 and 11335.1. The Employer's proposed election details are not consistent with Board procedure. I do not find that a mixed mail and manual election is appropriate in this case.

C. A Mail Ballot Election is Appropriate Given the COVID-19 Pandemic

A mail ballot election is also appropriate given the current pandemic. *San Diego Gas* allows Regional Directors to order mail ballot elections in the presence of extraordinary circumstances. The Board had found that COVID-19 constitutes an extraordinary circumstance. See, e.g., *Savage Services Corp.*, rev. denied 10/1/20; *Jersey Shore University Medical Center*, 22-RC-263932, rev. denied 10/1/20.

In *Aspirus Keweenaw*, 270 NLRB No. 45 (2020), the Board issued guidance on when mail ballot elections are appropriate given the current COVID 19 pandemic. The Board identified six

situations related to the COVID-19 pandemic that will normally suggest the propriety of conducting an election by mail, rather than manual ballot, including:

1. The Agency office tasked with conducting the election is operating under “mandatory telework” status;
2. Either the 14-day trend in the number of new confirmed cases of COVID-19 in the county where the facility is located is increasing, or the 14-day testing positivity rate in the county where the facility is located is 5 percent or higher;
3. The proposed manual election site cannot be established in a way that avoids violating mandatory state or local health orders relating to maximum gathering size;
4. The employer fails or refuses to commit to abide by the General Counsel’s protocols for Manual Elections established in GC Memo 20-10;
5. There is a current COVID-19 outbreak at the facility or the employer refuses to disclose and certify its current status; and/or
6. Other similarly compelling circumstances.

The Employer’s proposal would require a detailed analysis of five locations in five different states to ensure compliance with the Board’s guidance. Moreover, while the Employer the employees could vote at a training center, unit employees work at over 3000 locations. It would be impossible to ensure that the employees appearing to vote in person have been working in locations that comply with the Board’s requirements for safe in person elections, thus increasing the potential that other employees, party representatives, and Board personnel could be exposed to COVID 19. Further, the General Counsel’s protocols cited above require the Regional Director to consider the staffing required to run a manual election. The staffing required to ensure compliance with the Board’s guidance in five separate locations would unduly burden agency resources. I find that these considerations bolster the need for a mail ballot election in this case.

Under *San Diego Gas*, a mail ballot election is appropriate in this case given the fact that unit employees are scattered throughout the country. Moreover, given the pandemic, the safety of the voters, the observers, the party representatives, the Board agents conducting the election, and the public must be considered in determining the appropriate method for conducting the election. The Employer’s proposed mixed mail and manual election is not feasible under the Board’s procedures, especially when coupled with current concerns over the health and safety of all involved. Mail balloting provides no additional risk and is consistent with current guidance of limiting in-person contact and travel. Even in the midst of this pandemic, the Region has already successfully conducted a number of mail ballot elections. Based on the above and the record as a whole, I direct that the election in this case be conducted by mail ballot.

CONCLUSIONS AND FINDINGS

Based upon the entire record in this matter and in accordance with the discussion above, I conclude and find as follows:

1. The rulings at the hearing are free from prejudicial error and are hereby affirmed.

2. The Employer, a domestic corporation with its principal office located in New York, New York, provides security intelligence, training, investigation and explosive detection services. During the past twelve months, a representative period, it provided services valued in excess of \$50,000 directly to customers located outside the State of New York. The Employer is engaged in commerce within the meaning of the Act, and it will effectuate the purposes of the Act to assert jurisdiction herein.

3. The Petitioner is a labor organization within the meaning of Section 2(5) of the Act and claims to represent certain employees of the Employer. The Union is qualified to represent the unit within the meaning of Section 9(b)(3) of the Act.

4. A question affecting commerce exists concerning the representation of certain employees of the Employer within the meaning of Section 9(c)(1) and Section 2(6) and (7) of the Act.

5. The following employees of the Employer constitute a unit appropriate for the purposes of collective bargaining within the meaning of Section 9(b) of the Act:

All full-time and regular part-time K-9 handlers employed by the Employer but excluding all other employees including managers and supervisors as defined in Section 2(11) of the Act.

DIRECTION OF ELECTION

The National Labor Relations Board will conduct a secret ballot election among the employees in the unit found appropriate above. Employees will vote whether or not they wish to be represented for purposes of collective bargaining by United Federation of K-9 Handlers.

A. Election Details

I have determined that a mail ballot election will be held. The ballots will be mailed to employees employed in the appropriate collective-bargaining unit from the National Labor Relations Board, Region 29, on **December 28, 2020**. Voters must sign the outside of the envelope in which the ballot is returned. Any ballot received in an envelope that is not signed will be automatically void. Voters must return their mail ballots so that they will be received in the National Labor Relations Board, Region 29 office by the close of business on **January 25, 2021**. The mail ballots will be counted by video conference on a date and at a time and manner to be determined by the Regional Director after consultation with the parties.

If any eligible voter does not receive a mail ballot or otherwise requires a duplicate mail ballot kit, he or she should contact Nancy Lipin via telephone at (718) 765-6208 or via e-mail at

Nancy.Lipin@nlrb.gov by no later than 5:00 p.m. on January 8, 2021 in order to arrange for another mail ballot kit to be sent to that employee.

B. Voting Eligibility

Eligible to vote are those in the unit who were employed during the payroll period ending November 20, 2020 for employees based in California and November 22, 2020 for all other employees, including employees who did not work during that period because they were ill, on vacation, or temporarily laid off.

Employees engaged in an economic strike, who have retained their status as strikers and who have not been permanently replaced, are also eligible to vote. In addition, in an economic strike that commenced less than 12 months before the election date, employees engaged in such strike who have retained their status as strikers but who have been permanently replaced, as well as their replacements, are eligible to vote. Unit employees in the military services of the United States may vote if they appear in person at the polls.

Ineligible to vote are (1) employees who have quit or been discharged for cause since the designated payroll period; (2) striking employees who have been discharged for cause since the strike began and who have not been rehired or reinstated before the election date; and (3) employees who are engaged in an economic strike that began more than 12 months before the election date and who have been permanently replaced.

C. Voter List

As required by Section 102.67(l) of the Board's Rules and Regulations, the Employer must provide the Regional Director and parties named in this decision a list of the full names, work locations, shifts, job classifications, and contact information (including home addresses, available personal email addresses, and available home and personal cell telephone numbers) of all eligible voters.

To be timely filed and served, the list must be *received* by the regional director and the parties by November 27, 2020. The list must be accompanied by a certificate of service showing service on all parties. **The region will no longer serve the voter list.**

Unless the Employer certifies that it does not possess the capacity to produce the list in the required form, the list must be provided in a table in a Microsoft Word file (.doc or docx) or a file that is compatible with Microsoft Word (.doc or docx). The first column of the list must begin with each employee's last name and the list must be alphabetized (overall or by department) by last name. Because the list will be used during the election, the font size of the list must be the equivalent of Times New Roman 10 or larger. That font does not need to be used but the font must be that size or larger. A sample, optional form for the list is provided on the NLRB website at www.nlrb.gov/what-we-do/conduct-elections/representation-case-rules-effective-april-14-2015.

When feasible, the list shall be filed electronically with the Region and served electronically on the other parties named in this decision. The list may be electronically filed with the Region by using the E-filing system on the Agency's website at www.nlr.gov. Once the website is accessed, click on **E-File Documents**, enter the NLRB Case Number, and follow the detailed instructions.

Failure to comply with the above requirements will be grounds for setting aside the election whenever proper and timely objections are filed. However, the Employer may not object to the failure to file or serve the list within the specified time or in the proper format if it is responsible for the failure.

No party shall use the voter list for purposes other than the representation proceeding, Board proceedings arising from it, and related matters.

D. Posting of Notices of Election

Pursuant to Section 102.67(k) of the Board's Rules, the Employer must post copies of the Notice of Election accompanying this Decision in conspicuous places, including all places where notices to employees in the unit found appropriate are customarily posted. The Notice must be posted so all pages of the Notice are simultaneously visible. In addition, if the Employer customarily communicates electronically with some or all of the employees in the unit found appropriate, the Employer must also distribute the Notice of Election electronically to those employees. The Employer must post copies of the Notice at least 3 full working days prior to 12:01 a.m. of the day of the election and copies must remain posted until the end of the election. For purposes of posting, working day means an entire 24-hour period excluding Saturdays, Sundays, and holidays. However, a party shall be estopped from objecting to the nonposting of notices if it is responsible for the nonposting, and likewise shall be estopped from objecting to the nondistribution of notices if it is responsible for the nondistribution. Failure to follow the posting requirements set forth above will be grounds for setting aside the election if proper and timely objections are filed.

RIGHT TO REQUEST REVIEW

Pursuant to Section 102.67 of the Board's Rules and Regulations, a request for review may be filed with the Board at any time following the issuance of this Decision until 10 business days after a final disposition of the proceeding by the Regional Director. Accordingly, a party is not precluded from filing a request for review of this decision after the election on the grounds that it did not file a request for review of this Decision prior to the election. The request for review must conform to the requirements of Section 102.67 of the Board's Rules and Regulations.

A request for review must be E-Filed through the Agency's website and may not be filed by facsimile. To E-File the request for review, go to www.nlr.gov, select E-File Documents, enter the NLRB Case Number, and follow the detailed instructions. If not E-Filed, the request for review should be addressed to the Executive Secretary, National Labor Relations Board, 1015 Half

Michael Stapleton Associates Ltd. d/b/a
MSA Security
Case 29-RM-266140

Street SE, Washington, DC 20570-0001, and must be accompanied by a statement explaining the circumstances concerning not having access to the Agency's E-Filing system or why filing electronically would impose an undue burden. A party filing a request for review must serve a copy of the request on the other parties and file a copy with the Regional Director. A certificate of service must be filed with the Board together with the request for review.

Neither the filing of a request for review nor the Board's granting a request for review will stay the election in this matter unless specifically ordered by the Board. If a request for review of a pre-election decision and direction of election is filed within 10 business days after issuance of the decision and if the Board has not already ruled on the request and therefore the issue under review remains unresolved, all ballots will be impounded. Nonetheless, parties retain the right to file a request for review at any subsequent time until 10 business days following final disposition of the proceeding, but without automatic impoundment of ballots.

Dated: November 24, 2020



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